IN THE

# SUPREME COURT

OF THE

UNITED STATES

---

No. 345.

---

OCTOBER TERM, 1924.

---

A. J. BUCK, *Appellant,*

v.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*

---

# MOTION TO DISMISS

---


JOHN H. DUNBAR,
*Attorney General of the State of Washington,*

H. C. BRODIE,
*Assistant Attorney General of the State of Washington,*

*Counsel for Appellee.*

VANCE & CHRISTENSEN,
*Of Counsel.*

## INDEX.

## CASES AND STATUTES CITED.

## STATUTES.

# In the Supreme Court of the United States

No. 345.

OCTOBER TERM, 1924.

A. J. BUCK, *Appellant,*

v.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*

## PROOF OF MAILING PAPERS

STATE OF WASHINGTON, }
COUNTY OF THURSTON. } *ss.*

The undersigned being first duly sworn on oath deposes and says: that on October 9th, 1924, at Olympia, Washington, he deposited in the United States post office, in a sealed envelope addressed "W. R. Crawford, 325 Lumber Exchange Building, Seattle, Washington," true copies of the papers en-

titled in this case styled "Notice," "Motion to Dismiss," "Statement" and "Argument."

.....

Subscribed and sworn to before me this..... day of October, 1924.

.....

*Notary Public in and for the State of Washington, residing at Olympia, Washington.*

My commission expires.....

# IN THE SUPREME COURT OF THE UNITED STATES

No. 345.

OCTOBER TERM, 1924.

A. J. BUCK, *Appellant,*

v.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*

## NOTICE.

*To—*

A. J. BUCK, *Appellant,* and to

W. R. CRAWFORD, his counsel:

PLEASE TAKE NOTICE that on Monday, November 10, 1924, at 12 o'clock noon, or as soon thereafter as counsel may be heard, the appellee herein will submit to the consideration of the court his motion to dismiss, a copy of which is attached.

JOHN H. DUNBAR,
*Attorney General of the State of Washington,*

H. C. BRODIE,
*Assistant Attorney General of the State of Washington,*
*Counsel for Appellee.*

# IN THE SUPREME COURT OF THE UNITED STATES

No. 345.

OCTOBER TERM, 1924.

A. J. BUCK, *Appellant,*

v.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*

## MOTION TO DISMISS.

Now comes the appellee herein and moves the court to dismiss the appeal herein upon the following grounds:

I.

That this court has no jurisdiction to review the judgment of the District Court for the reason that no Federal question is involved.

JOHN H. DUNBAR,
*Attorney General of the State of Washington,*

H. C. BRODIE,
*Assistant Attorney General of the State of Washington,*
*Counsel for Appellee.*

VANCE & CHRISTENSEN,
*Of Counsel.*

## STATEMENT.

For the purpose of the motion hereinbefore set out, the facts involved may be stated as follows:

The 1921 Legislature of the State of Washington passed an act known as Chapter 111, Laws of 1921, being entitled,

"AN ACT providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof."

Section 4 of this act provides as follows:

"No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the commission that such person, firm or corporation was actually operating in good faith, over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a

territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require."

Pursuant to said act, and particularly section 4 thereof, the appellant herein made an application to the Department of Public Works of the State of Washington for a certificate of convenience and necessity to operate as an auto transportation company in the carriage of passengers and express between Seattle and Tacoma, Washington, and Portland, Oregon. A hearing was had before the said Department of Public Works and findings of fact made and an order entered by said department denying the said application, which order was made in June, 1923. A summary of the provisions of these findings and order will be found in the opinion of the statutory court (Tr., p. 34; 295 Fed. 204), and the findings and order are printed in full in *In re Buck,* P. U. R. 1923E 737. In October, 1923, the appellant filed a complaint in the District Court of the United States for the Western District of Washington, Southern Division (Tr., p. 16), seeking to enjoin the Department of Public Works of the State

of Washington from interfering with his operation as an auto transportation company between Seattle and Tacoma, Washington, and Portland, Oregon, and applied to said District Court under section 266 for a temporary injunction. A hearing was had before the statutory court and the temporary injunction denied. (Tr., p. 25; 295 Fed. 197.) Leave was thereafter granted to file an amended complaint, and appellant, on December 22, 1923, filed in said court his amended complaint (Tr., p. 1), and renewed his application for a temporary injunction, which application was again heard by the statutory court under section 266 of the Judicial Code and the temporary injunction again denied. (Tr., p. 34, 295 Fed. 203.) On January 21, 1924, the appellee's motion to dismiss the amended bill of complaint was heard before the District Court and an order entered dismissing the bill and the suit. (Tr., pp. 12 and 13.) An appeal was prosecuted to this court from such dismissal.

## ARGUMENT.

An appeal direct from the District Court to the Supreme Court can only be taken pursuant to the provisions of section 238 of the Judicial Code. The only grounds set forth in that section which could be claimed to be applicable in this case are that the judgment complained of "involves the construction or application of the Constitution of the United States," or that the "constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The amended bill of complaint alleges that the acts of the appellee and the statute above referred to deprive appellant of his property without due process of law and place a burden upon interstate commerce in contravention to the Fourteenth Amendment and section 8 of Article I of the Constitution of the United States. An examination of the amended bill of complaint, however, will show that it is not charged that the action of appellee was unreasonable, arbitrary, capricious or fraudulent in itself, and if the statute is valid, we are satisfied the bill of complaint does not allege any facts which would bring it within section 238, *supra*. In its final analysis the complaint resolves itself into an allegation that section 4 of chapter 111 of the Laws of Washington for 1921, being section 6390, Remington's Compiled Statutes, is unconstitutional.

The allegation of the unconstitutionality of this section of the statute is undoubtedly sufficient to bring appellant within the provisions of section 238, *supra,* if the appellant is in position to urge such question. For reasons hereinafter set forth, we believe that appellant is estopped from contesting the validity of this statute, and if such be the case, there would remain no Federal question as a foundation for an appeal to this court.

We believe that this case is governed by the principles of law set forth in the following texts:

Note in 19 Ann. Cas. 183 and Ann. Cas. 1915C 62, states:

"It is well settled as a general proposition that a person who has invoked the benefit of an unconstitutional law cannot in a subsequent litigation aver its unconstitutionality as a defense."

In the article on constitutional law in 12 C. J. 769, section 190:

"A person may by his acts or ommission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus, a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality."

In the article on constitutional law, 6 R. C. L. 94, section 95:

"The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense."

The foregoing principle of law has been repeatedly announced by this court. In the case of *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125, 128; 66 L. ed. 856, 857, the statutes of Oklahoma provided that every corporation engaged in that state in the carrying of crude petroleum through pipe lines should be deemed a common carrier. After the passage of this statute the Pierce Company qualified as a foreign corporation to do business in Oklahoma and upon its refusal to convey petroleum for the Phoenix Company, a hearing was had by the Oklahoma Corporation Commission and an order entered holding the Pierce Company a common carrier and requiring it to carry oil for the Phoenix Company. This court, on writ of error from the Supreme Court of the State of Oklahoma to review a judgment which affirmed the order of the Corporation Commission affirmed the state court. The following language is used with reference to the estoppel operating against the Pierce Company to allege the unconstitutionality of the Oklahoma statute:

"When the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intra-

state business is considered, * * * *the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced futile to the point almost of being frivolous.* 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U. S. 56, 66); and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional. A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the Pipe Line Cases * * * , in a single sentence, saying: 'So far as the statute contemplates future pipe lines, and prescribes conditions under which they may be established, there can be no doubt that it is valid.'

"There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. * * *" (Italics ours)

The case of *Wall v. Parrot Silver and Copper Mining Co.*, 244 U. S. 407, 411; 61 L. ed. 1229, 1231, involved an appeal from the District Court of Montana to review a decree in favor of defendants in a suit by minority stock holders to set aside an executed sale of all the property and assets of the corporation. The plaintiffs based their cause of action upon the alleged unconstitutionality of a Montana statute. This court affirmed the District Court and with reference to the question of estoppel, says:

"There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of appellants, by a court and jury.

"*This record does not call upon us to examine into this challenge of the validity of these statutory provisions,* similar as they are to those of many other states and of a seemingly equitable character, *for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes,* which is still pending, *waived their right to assail the validity of them.* * * * *They cannot claim the benefit of statutes and afterwards assail their validity.* There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be." (Italics ours)

The case of *Grand Rapids & Indiana Ry. Co. v. Osborn,* 193 U. S. 17, 29, 48 L. ed. 598, 604, was a writ of error to the Supreme Court of the State of Michigan to review a judgment affirming an order of a Circuit Court of that state awarding a peremptory writ of mandamus to compel a reduction of railroad rates in conformity with a state act. This court affirmed the State Supreme Court. The railroad company had incorporated in Michigan under the Michigan statutes and it was held that the company was

estopped to contest the validity of the provisions of that incorporation act regulating railroad rates which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body. With reference to this question of estoppel this court said:

"It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body."

The case of *Shepard v. Barron,* 194 U. S. 553, 567; 48 L. ed. 1115, 1120, was an appeal from the Circuit Court of the United States in Ohio to review a judgment dismissing a bill to enjoin a county treasurer from proceeding to collect a balance of an assessment for a public improvement. This court affirmed the Circuit Court. The appellants, being property owners, had petitioned for the improvement under a state act, had participated in carrying out the work and recognized the justice of the assessments from time to time during the progress of the

work, and had filed a statement for the purpose of inducing the issuance and purchase of county bonds, and it was held that they were estopped from contesting the constitutionality of the method of assessment provided for in the act. With reference to this question of estoppel, this court said:

*"On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken,* and that the assessment should be made in accordance with those provisions." (Italics ours)

The case of *Pierce v. Somerset Railway,* 171 U. S. 641, 648, 43 L. ed. 316, 319, was a writ of error to the Supreme Court of Maine to review a judgment in favor of the Somerset Railway in an action commenced by it against Louis Pierce, et al., to enjoin the further prosecution of certain actions. The writ was dismissed. It was held that the plaintiff in error was estopped to contest the validity of the state statute involved. With reference to estoppel, this court said:

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

The case of *Electric Co. v. Dow,* 166 U. S. 489, 490, 41 L. ed. 1088, 1089, was a writ of error to the Supreme Court of New Hampshire to review a judgment against the Electric Co. upon a petition filed

by Dow for the assessment of damages occasioned to his land by an overflow caused by a dam erected by the defendant company. The state court was affirmed. The proceedings for the assessment of damages were instituted under a statute of New Hampshire. It was held that a party electing to have damages assessed in the manner provided by the statute was estopped from denying the validity of another provision of the statute providing for the addition of fifty per cent to the verdict of the jury. With reference to estoppel this court said:

"We agree with the supreme court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that 50 per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not as it thought fit."

The case of *Ficklen v. The Taxing District of Shelby County,* 145 U. S. 1, 24, 36 L. ed. 601, 607, was a writ of error to the Supreme Court of Tennessee to review a judgment reversing a decree of the Chancellor which overruled a demurrer and decreed a perpetual injunction in behalf of Ficklen to restrain the collection of a tax on his business. The judgment of the state court sustained the demurrer and dismissed the suit, and this court affirmed the state court. The plaintiff in error and others had taken out licenses under a Tennessee statute to do

a general commission business and had given bond to report their commissions during the year and to pay the required tax thereon, and it was held that they could not when applying for a similar license the next year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. It was held that having complied with the statute, they were estopped from contesting its constitutionality. With reference to a question of estoppel, this court said:

"* * * We agree with the Supreme Court of the State that the complainants having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

The case of *Great Falls Manufacturing Co. v. Garland,* 124 U. S. 581, 600, 31 L. ed. 527, 533, was an appeal from the United States Circuit Court for the District of Maryland dismissing a suit brought to restrain defendants from occupying certain land. This court affirmed the Circuit Court. It was held that the plaintiff, by suing the United States in the

Court of Claims, had assented to the taking of his property by the government for public use under a certain act of Congress and had agreed to submit the determination of the question of compensation to the tribunal named by Congress and had waived the right that compensation be paid in advance of taking and the right to demand that the amount of compensation be determined by a jury. With reference to his estoppel to contest the validity of the act of Congress involved in that litigation this court said:

"It is scarcely necessary to say that it is immaterial that the plaintiff invoked the jurisdiction of the court of claims from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property. If the act of the Secretary of War in taking possession of the property was in violation of law, neither he nor his agents could rightfully hold possession against the plaintiff; in which case the plaintiff might have stood upon its rights, under the Constitution, and invoked judicial authority for such protection as the law would afford against the unauthorized acts of public officers. But the plaintiff chose to acquiesce in the taking of its property for public use, and to accept the offer of the Government to have the amount of compensation fixed by the court of claims, according to its peculiar modes of procedure. The reasons inducing the plaintiff to adopt such a course can have no influence upon the action of that court, nor affect its power to ascertain and award just compensation for the loss of the property."

Other cases of this court on similar questions of estoppel and waiver are:

*Milheim v. Moffat Tunnel Improvement District,* 252 U. S. 710, 723; 67 L. ed. 1194, 1202;

*St. Louis Malleable Casting Co. v. Prendergast Construction Co.,* 260 U. S. 469, 67 L. ed. 351;

*Hurley v. Commission of Fisheries of Virginia,* 257 U. S. 223, 66 L. ed. 206;

*Farncomb v. City and County of Denver,* 252 U. S., 7, 11; 64 L. ed. 424, 427;

*Leonard v. Vicksburg S. & P. R. Co.,* 198 U. S. 416, 422; 49 L. ed. 1108, 1111;

*Detroit, Ft. Wayne & Belle Isle Ry. v. Osborn,* 189 U. S. 383; 47 L. ed. 860;

*Gallup v. Schmidt,* 183 U. S. 300; 46 L. ed. 207;

*Eustis v. Bolles,* 150 U. S. 361; 37 L. ed. 1111;

*Daniels v. Tearney,* 12 Otto 415; 26 L. ed. 187;

*Clay v. Smith,* 3 Peters 411; 7 L. ed. 723.

Innumerable cases might be cited from the lower Federal courts and the state courts, but in view of the repeated affirmance of this principle by this court it is unnecessary to cite any other cases than the above.

The examination of the amended bill of complaint in the instant case will show clearly that appellant made application to the department of public works of the State of Washington for a certificate of convenience and necessity to operate as an auto transportation company between Seattle and Tacoma, Washington, and Portland, Oregon, under the provisions of chapter 111, Laws of Washington, 1921,

and in such application, agreed to comply with all the statutes of the state relative to such operation, and the complaint sets forth that the appellant is and has at all times been willing to comply with all the provisions of the state statute. Paragraph 10 of the amended bill of complaint (Tr. p. 7), alleges:

"That the plaintiff, being desirous of engaging in interstate commerce by transporting persons for compensation between the cities of Seattle and Tacoma, Washington, and Portland, Oregon, and not doing any Intrastate business whatever and in order to carry on such business subject to all laws, rules and regulations of the State of Washington, did duly apply to the defendant herein for a certificate under the provisions of chapter 111 of the laws of 1921. That such application, sworn to by the plaintiff, was prepared on the form furnished by the defendant. That such printed form contained the following, being clause 13 thereof and reading as follows:

" 'Applicant is familiar with the provisions of chapters 96, 108 and 111, Session laws of 1921, and the Rules and Regulations of the Department of Public Works of Washington, governing the equipment and operation of motor vehicles upon the highways of the State of Washington and promises prompt compliance therewith.'

"That the plaintiff had complied and has complied with all of the laws, rules and regulations of the Department of Public Works in connection with the said application. That the said law chapter 111 and the rules and regulations of the said Department of Public Works required the plaintiff to do or perform no other thing in connection with the said application than he had done and performed. Further, the plaintiff on oath had promised prompt compliance with the provisions of chapters 96, 108 and 111, of the session laws of 1921, governing the equipment

and operation of motor vehicles upon the Public Highways of the State. That the (fol. 13) plaintiff had and has complied in all respects with the provisions of Chapter 96, of the Session laws of 1921, as amended, and Chapter 108 of the Session laws of 1921, as amended, as hereinbefore alleged. That the said defendant herein in June, 1923, entered an order on said application denying a certificate or license to said plaintiff to engage in said interstate commerce solely upon the grounds that the local service furnished by the said 4 certificate holders and the train service furnished adequate transportation between Seattle and Tacoma, Washington and Portland, Oregon; and that plaintiff if granted a certificate did not show sufficient financial ability to purchase or acquire motor vehicles to operate such interstate commerce. That plaintiff was and is now financially able to acquire motor vehicles sufficient in number to operate such interstate commerce and is financially able to do such business.

"That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do, and said denial of said certificate was not based upon the refusal of plaintiff to comply with any provisions of the laws or rules and regulations of the department as plaintiff had complied as far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of Chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth."

We respectfully submit that this application for a certificate under the statute admitted the validity of the law and was an attempt to obtain for the appellant all the benefits, privileges and advantages accruing to the holder of a certificate of convenience and necessity issued under the act. In other words, the appellant having sought to obtain the benefits of the act is, under the rule of the cases and texts above cited, estopped from questioning the validity and constitutionality of the act in question. The bill of complaint herein shows clearly that appellee's position is that of one who sought to obtain all the benefits of the statute of the State of Washington, and when, after a full hearing, and without any unreasonable, arbitrary, capricious or fraudulent action on the part of the state department charged with the administration of the act, he was denied the certificate of convenience and necessity sought, then, chagrined and disappointed by his failure to obtain the benefits sought, turns about and attacks the act under which he had applied, as unconstitutional and void.

We therefore urge that appellant's application for a certificate and his willingness to comply with all the provisions of the state statute have estopped him from contesting the validity of the act, and not being in position to urge before this court the unconstitutionality of the act challenged, there is no

Federal question involved in the appeal and this court should therefore dismiss the same.

Respectfully submitted,

JOHN H. DUNBAR,
*Attorney General,*

H. C. BRODIE,
*Assistant Attorney General,*
*Counsel for Appellee.*

VANCE & CHRISTENSEN,
*Of Counsel.*